IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 12, 2006

STATE OF TENNESSEE v. DANIEL WILLIAM DAVENPORT

Direct Appeal from the Criminal Court for White County
No. CR001934 Leon C. Burns, Jr., Judge

No. M2005-01157-CCA-R3-CD - Filed May 30, 2007

The appellant, Daniel William Davenport, was convicted pursuant to a bench trial for a violation of the Sexual Offender Registration and Monitoring Act, and he received a sentence of eleven months and twenty-nine days. On appeal, the appellant challenges the sufficiency of the evidence, the qualification of a records custodian, and the sentence he received. Upon our review of the record and the parties' briefs, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

David Brady (on appeal) and John B. Nisbett, III (at trial and on appeal), Cookeville, Tennessee, for the appellant, Daniel William Davenport.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; William E. Gibson, District Attorney General; and Beth Willis, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

At trial, Mark Ledbetter testified that he had been the appellant's probation officer in Cumberland County after the appellant was convicted on May 30, 2000, of statutory rape and received a two-year sentence. On June 2, 2000, the appellant first met with Ledbetter, and Ledbetter explained to the appellant that because of his conviction for statutory rape, he needed to comply with the Tennessee Bureau of Investigation (TBI) sex offender registry. The appellant seemed to understand the requirement. Ledbetter reviewed with the appellant the requirements of compliance with the registry, including the Sex Offender Release Notification Form which provides that the appellant has been apprised of the requirements of the registry and the sanctions for non-compliance.

After they reviewed the form, the appellant signed it. Ledbetter testified that he was required to submit the Sexual Offender Release Notification Form to the TBI. Additionally, the appellant was given a Sexual Offender Registration Form. The appellant was required to sign and submit this form to the TBI within ten days of his release from confinement. During the course of his sentence, the appellant violated probation twice and "flattened" his sentence for statutory rape on January 22, 2003.

Elaine Bomar testified that she worked for the TBI as a law enforcement information coordinator with the sexual offender registry. She asserted that she and five other people were the records custodians for the sexual offender registry forms. She explained that when an offender is convicted of a sexual offense, the first form submitted to the TBI is the Sexual Offender Release Notification Form. The offender is then put into the system "kind of in a hold position" until the TBI receives the second form, the Sexual Offender Registration Form. After both forms are received, the TBI sends the monitoring forms to the offender quarterly in March, June, September, and December.

Bomar stated that when an offender is incarcerated, the TBI "put[s] them into inactive incarcerated status." The TBI does not mail the offender a monitoring form until the offender is released from confinement. She explained that upon the subsequent incarceration of a sexual offender, the TBI mails to the facility in which the offender is incarcerated a letter and instructions for the sex offender registry. Additionally, the TBI sends the facility two forms, the Sexual Offender Release Notification Form and the Sexual Offender Registration Form. Bomar testified that her records reflect that on June 15, 2002, the appellant was incarcerated in the Cumberland County Jail. Within ten days of the appellant's release, he was required to send the TBI an updated address so that the quarterly mailing of the monitoring forms could resume. Bomar stated that the appellant was released from confinement on January 22, 2003. However, the TBI did not receive an updated address from the appellant until May 5, 2004, when the TBI received a Sexual Offender Release Notification Form which indicated that the appellant was released on January 22, 2003. The form showed that the appellant was notified about the Sex Offender Registry Program on April 17, 2004, by a member of the Cumberland County Sheriff's Department. Bomar stated that without the appellant's updated address, the TBI had been unable to send the appellant quarterly monitoring reports.

As an exhibit, the State submitted a certified mail receipt, demonstrating that on June 15, 2002, the appellant signed for a certified letter from the TBI. The appellant's address on the certified letter was in Sparta, located in White County.

At the conclusion of the bench trial, the trial court found the appellant guilty of the Class A misdemeanor of failing to comply with the Sexual Offender Registration and Monitoring Act.[1] At

[1] Effective August 1, 2004, the Sexual Offender Registration and Monitoring Act was repealed and was replaced with the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking

(continued...)

a sentencing hearing, the trial court noted that the appellant had a few prior criminal convictions, warranting the imposition of the maximum sentence of eleven months and twenty-nine days. On appeal, the appellant challenges Bomar's classification as a records custodian, the sufficiency of the evidence supporting his conviction, and the sentence imposed by the trial court.

II. Analysis

A. Tennessee Rule of Evidence 803(6)

On appeal, the appellant argues that the trial court erred by allowing Bomar to testify as a "records custodian" for the TBI. Specifically, the appellant complains that Bomar was not the sole person in charge of maintaining the sexual offender registry records in general or the appellant's registry records in particular nor did she have the "knowledge of the method of preparing and preserving" the records.

Tennessee Rule of Evidence 803(6) provides the following exception to the hearsay rule:

> Records of Regularly Conducted Activity. - A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

This court has noted that

> "Rule 803(6) simply provides that the witness be the records 'custodian or other qualified witness.' Typically that witness will be in charge of maintaining records of the particular business, but other employees or officers or appropriately informed witnesses could be used as well. The key is that the witness have knowledge of the method of preparing and preserving the records. If no witness is

[1](...continued)
Act of 2004. See Tenn. Code Ann. § 40-39-201, Compiler's Notes (2006).

> available to testify, the records cannot be authenticated as business records, unless the parties stipulate to authentication."

State v. Dean, 76 S.W.3d 352, 365 (Tenn. Crim. App. 2001) (quoting Neil P. Cohen et al., Tennessee Law of Evidence, § 8.11[11] (4th ed. 2000)).

Bomar testified that she was one of six people in charge of maintaining the sexual offender registry records. Moreover, she clearly testified in detail regarding the methods of preparing and preserving the records. Accordingly, we conclude that the trial court did not err in finding that Bomar was a records custodian for the purposes of Rule 803(6). See State v. Robert Leonard Flatt, No. M2005-02047-CCA-R3-CD, 2006 WL 3044158, at *3 (Tenn. Crim. App. at Nashville, Oct. 3, 2006), perm. to appeal denied, (Tenn. 2007).

B. Sufficiency of the Evidence

The appellant next raises several challenges to the sufficiency of the evidence. Specifically, the appellant argues that "at trial no one identified [the appellant] as the person who committed the crime"; the proof was insufficient to demonstrate that the appellant "was not incarcerated during the entire time set out in the indictment and therefore was not subject to the sex offender registration requirements"; and the State failed to establish that White County was the proper venue for the case. Additionally, the appellant complains that the trial court erred in not granting the appellant's motion for a judgment of acquittal because the State did not specify a date in the indictment and because the charged offense is not a continuing crime. Finally, the appellant maintains that the State "failed to establish that the State had complied with the sex offender registration statute."

On appeal, a jury conviction removes the presumption of the appellant's innocence and replaces it with one of guilt, so that the appellant carries the burden of demonstrating to this court why the evidence will not support the jury's findings. See State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The appellant must establish that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e).

Accordingly, on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). In other words, questions concerning the credibility of witnesses and the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, and not the appellate courts. See State v. Pruett, 788 S.W.2d 559, 561 (Tenn. 1990). Moreover, "[t]he standard by which the trial court determines a motion for judgment of acquittal at the end of all the proof is, in essence, the same standard which applies on appeal in determining the sufficiency of the evidence after a conviction." State v. Thompson, 88 S.W.3d 611, 614-15 (Tenn. Crim. App. 2000). Therefore, we will address all of the appellant's complaints as a challenge to the sufficiency of the evidence.

Initially, we note that the appellant was charged with a violation of Tennessee Code Annotated section 40-39-108 (repealed 2004). The statute provides:

> (a) Knowing falsification of a sexual offender registration/monitoring form or verification/monitoring form constitutes a Class A misdemeanor for the first offense, punishable by confinement in the county jail for not less than one hundred eighty (180) days. The minimum one hundred eighty-day sentence provided for the Class A misdemeanor offense of knowing falsification of a sexual offender registration/monitoring or verification/monitoring form is mandatory. . . . Knowing failure to timely disclose required information or photographs or to timely deliver required registration/monitoring or verification/monitoring forms to the TBI shall be deemed to be falsification to the same extent as actually providing false information.
>
> (b) In a prosecution for a violation of this section, in lieu of live testimony the TBI records custodian may, by sworn affidavit, verify that according to such records a sexual offender is in violation of the registration or verification requirements of this chapter.

First, the appellant states that the State failed to prove that he was the individual who committed the crime. However, we note that Ledbetter testified that the appellant, who was sitting at the defense table, was Daniel Davenport who was convicted of statutory rape in 2000, thereby requiring him to comply with the Sexual Offender Registration and Monitoring Act. Additionally, Bomar testified that after the release of Daniel Davenport from the Cumberland County Jail on January 22, 2003, the TBI received no registration materials from Daniel Davenport until May 5, 2004. Therefore, we conclude that the State sufficiently proved that the appellant was the person who failed to comply with the Sexual Offender Registration and Monitoring Act. This issue is without merit. See Flatt, No. M2005-02047-CCA-R3-CD, 2006 WL 3044158, at *3.

Second, the appellant argues that the proof was insufficient to demonstrate that the appellant "was not incarcerated during the entire time set out in the indictment and therefore was not subject to the sex offender registration requirements." The indictment in the instant case charged that the appellant failed to comply with the Sexual Offender Registration and Monitoring Act "within two (2) years prior to the finding of this indictment, in White County, Tennessee and before the finding of this indictment." See Tenn. Code Ann. §§ 40-39-103, -108 (2003) (repealed 2004). The indictment was returned on September 8, 2004.[2] The proof at trial showed that the appellant was incarcerated on June 15, 2002, and he was released from confinement on January 22, 2003. The appellant failed to report to the TBI until May 5, 2004. Therefore, the proof clearly revealed that the

[2] The indictment noted that "[p]ursuant to T.C.A. §40-2-104, the Statute of Limitation has been tolled by taking a warrant on August 6, 2003 and it not being served until April 24, 2004."

appellant was guilty of non-compliance for over a year after he was released from confinement. This issue has no merit.

Third, the appellant contends that the State failed to establish that White County was the proper venue for the case. This court has explained that

> the state has the burden to prove that the offense was committed in the county of the indictment. Venue may be shown by a preponderance of the evidence, which may be either direct, circumstantial, or a combination of both. Venue is not an element of the offense. . . . Rule 18(b) of the Tennessee Rules of Criminal Procedure provides that "if one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county."

State v. Smith, 926 S.W.2d 267, 269 (Tenn. Crim. App. 1995) (citations omitted).

As we noted earlier, the State submitted a certified mail receipt as an exhibit, demonstrating that on June 15, 2002, the appellant signed for a certified letter from the TBI. The address on the certified letter reflected that the appellant signed for the letter in Sparta, which is located in White County. The trial court used this letter as proof of venue. Likewise, we conclude that the proof at trial sufficiently established that the last known address the TBI had for the appellant before he began his non-compliance was in White County.

Fourth, the appellant complains that the State was required to elect a date on which he failed to comply with the sex offender registry because a failure to comply with the Sexual Offender Registration and Monitoring Act is not a continuing crime. However, this court has previously addressed this exact issue and concluded "that failure to register as a sex offender is a continuing offense." Flatt, No. M2005-02047-CCA-R3-CD, 2006 WL 3044158, at *5. Therefore, the appellant is not entitled to relief on this issue.

Finally, the appellant asserts that the State failed to establish that an agent of the State complied with the mandates of the Sexual Offender Registration and Monitoring Act. Specifically, he alleges that he was not apprised within ninety days of his January 22, 2003, release from the Cumberland County Jail of his duty to report his updated address to the TBI and other requirements for compliance with the sexual offender registry. In support of this proposition, the appellant cites Tennessee Code Annotated section 40-39-105 (repealed 2004):

> (c) At least ninety (90) days prior to the release of a sexual offender from incarceration with or without supervision, the warden of the correctional facility or jail shall obtain the offender's signed statement acknowledging that the named warden or the warden's agent has fully explained, and the offender understands, the registration and

> verification requirements and sanctions of this chapter. If the offender is to be released without any type of supervision, the warden of the correctional facility or jail shall provide the offender with a blank TBI sexual offender registration/monitoring form and assist the offender to complete the form. The warden shall also obtain a current photograph of the offender. Forms for such statements of acknowledgment shall be designed, printed, and distributed by, and at the expense of, the TBI and shall require disclosure of the offender's anticipated residential address. The warden shall promptly cause the signed and completed acknowledgment form, the sexual offender registration/monitoring form and the photograph of the offender to be delivered to TBI headquarters in Nashville within three (3) days of the release of the offender.

At trial, Bomar testified that her records reflected that the appellant was released from the Cumberland County Jail on January 22, 2003. On May 5, 2004, the TBI received a Sexual Offender Release Notification Form which indicated that the appellant was notified about the Sex Offender Registry Program on April 17, 2004, by a member of the Cumberland County Sheriff's Department. However, Ledbetter testified that on June 2, 2000, when the appellant was released on probation for his statutory rape conviction, Ledbetter informed the appellant of the requirements for compliance with the sexual offender registry and the need for continued compliance for ten years.

At the conclusion of the bench trial, the trial court found that the appellant

> was advised at the time of his release on probation initially, and I am not of the opinion that each time he is incarcerated that he had to be re-advised of that obligation. Even though he is not mailed the registration forms, or the verification forms while he is incarcerated, he still had the notice initially that he is to mail in his whereabouts.

Like the trial court, we conclude that the appellant was aware of his obligation to continue reporting to the TBI in order to comply with the sexual offender registry.[3]

C. Sentencing

[3] Interestingly, Tennessee Code Annotated section 40-39-105(e) (repealed 2004) provided that "[t]hrough press releases, public service announcements, or through other appropriate public information activities, the TBI shall attempt to ensure that all sexual offenders . . . are informed and periodically reminded of the registration and verification requirements and sanctions of this chapter." However, the new Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004 provides that an "offender's signature on the TBI registration form creates the presumption that the offender has knowledge of the registration, verification, and tracking requirements of this part." Tenn. Code Ann. § 40-39-203(k) (2006).

As his final issue, the appellant challenges the trial court's imposition of the maximum sentence of eleven months and twenty-nine days, specifically arguing that the sentence is too harsh and the appellant should have received a sentence of 180 days, the statutory minimum for the crime.

When an appellant challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). Generally, the presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). However, the trial court has more flexibility in misdemeanor sentencing than in felony sentencing. State v. Johnson, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (citing State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998)). Review of misdemeanor sentencing is de novo with a presumption of correctness even if the trial court failed to make specific findings on the record, because the "trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." Troutman, 979 S.W.2d at 274.

In sentencing the misdemeanor defendant, the trial court shall fix a percentage of the sentence, not to exceed seventy-five percent, that the defendant must serve in confinement before being eligible for release into rehabilitative programs. Tenn. Code Ann. § 40-35-302(d) (2003). In determining the percentage of the sentence to be served in confinement, the trial court shall consider the sentencing principles and enhancement and mitigating factors and "shall not impose such percentages arbitrarily." Id.; see also Troutman, 979 S.W.2d at 274. In conducting our review, this court must consider (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to the sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also Ashby, 823 S.W.2d at 168. The burden is on the appellant to show that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

The Sexual Offender Registration and Monitoring Act provides that violating the Act constitutes a Class A misdemeanor punishable by no less than 180 days. See Tenn. Code Ann. § 40-39-108(a). However, the maximum sentence permissible for a conviction for a Class A misdemeanor is eleven months and twenty-nine days. See Tenn. Code Ann. § 40-35-111(e)(1) (2003). As this court has previously noted, "By setting a minimum time period that must be served in confinement, the statute in no way indicates that a longer sentence is improper: it sets the floor but does not comment on the ceiling." Flatt, No. M2005-02047-CCA-R3-CD, 2006 WL 3044158, at *5. In the instant case, the trial court found that a sentence of eleven months and twenty-nine days was proper, specifically considering that the appellant's previous criminal convictions. We conclude that the record fully supports the sentence imposed by the trial court.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE